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In The
Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents.

On Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF *AMICI CURIAE* OF FORMER ASSISTANT ADMINISTRATORS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY J. CHARLES FOX, G. TRACY MEHAN III, AND ROBERT PERCIASEPE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are former Assistant Administrators for Water of the United States Environmental Protection Agency ("EPA").[1] Each was responsible for administering the Clean Water Act ("the Act"), including responsibility for interpreting the meaning and scope of the Act's provisions in general rulemakings and specific permit adjudications. Each was also, at a different time in his career, a state environmental official with responsibility for administering the Clean Water Act's delegated programs. Each *amicus* has a longstanding professional expertise relevant to this case and a strong personal interest in the protection of the nation's waters. A fuller description of the backgrounds of the individual *amici* is set forth in Appendix B to this brief.

This case involves § 401 of the Act, which requires an applicant for a federal license or permit to obtain a certification from the appropriate State that any "discharge" from its project will comply with provisions of the Act. Petitioner S.D. Warren ("Warren") argues that the release of water from its dam does not constitute a discharge subject to § 401. *Amici* believe that, consistent with the long-standing interpretation and practice of § 401 by EPA and by the States, releases of water from dams plainly qualify as discharges under § 401. Because the State of Maine and other parties will thoroughly address the scope

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[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned affirm that (1) this brief is filed with the parties' written consent, copies of which have been filed with the Clerk, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than *amici* or its counsel made a monetary contribution to the submission of this brief.

of § 401 in their merits briefs, *amici* do not address this point further in this brief.

Amici are concerned, however, that the Court's resolution of that issue could involve consideration of the scope of the Act's regulatory program under other provisions of the Act, and that certain of Warren's arguments could lead to an improperly narrow definition of that authority, frustrating the law's express terms as well as its purposes. Although this case involves the proper construction of § 401, and does not directly involve the provisions of the Act that regulate the "discharge of pollutants," petitioner S.D. Warren Company ("Warren") seeks to define the term "discharge" in § 401 by reference to those provisions. Warren observes that the phrase "discharge of a pollutant" is defined as an "addition" to a navigable water in § 502(12) of the Act, and argues that a release of water from one part of a river into another part of the same river cannot constitute a "discharge" because it does not "add" anything to the water body.

Amici believe Warren's argument is wrong as applied to § 401, since a "discharge" under that provision is broadly defined, and need not involve an "addition." Even with respect to the "discharge of pollutants" under other provisions of the Act, however, *amici* believe that Warren's argument is overly simplistic, and could, if adopted without qualification by the Court, inadvertently undermine the Act's regulation of discharges of dredged and fill material under § 404. *Amici* submit this brief to clarify that, at least with respect to discharges of dredged material, the movement and redeposit of material within a

single water body can plainly constitute an "addition" of a pollutant subject to regulation under the Act.

SUMMARY OF ARGUMENT

The scope of the Act's regulation of discharges of pollutants is not directly at issue in this case, which concerns the proper interpretation of the broader term "any discharge" under § 401. However, if the Court considers the Act's regulation of discharges of pollutants in resolving this case, the Court should recognize that movement and redeposit of a pollutant within a single water body can, at least in one important circumstance, constitute a discharge of a pollutant. Dredged spoil, by definition, is material taken from a water body, and is commonly redeposited within the same water body. Section 404 of the Act expressly regulates the discharge of such dredged material, reflecting Congress's concern about the degrading effects on water quality of such dredging-related disposal practices. The consistent judicial interpretation of § 404 by courts of appeals stretching back two decades thus confirms that movement of dredged or fill material within a single water body can constitute a discharge of a pollutant. Reading the Act in such a way as to exclude from regulation such redeposit of pollutants within the same water body would cause grave environmental impacts, undermining the purposes of the Act. Therefore, any consideration by the Court of the scope of the Act's authority to regulate discharges of pollutants should recognize that, at least with respect to dredged

material, the redeposit of material into the same water body can constitute a "discharge of a pollutant."

ARGUMENT

I. THE SCOPE OF THE ACT'S REGULATION OF DISCHARGES OF POLLUTANTS IS NOT AT ISSUE IN THIS CASE.

This case involves the proper interpretation of § 401 of the Act, which requires an applicant seeking a federal license or permit to conduct "any activity . . . which may result in any discharge into the navigable waters" to obtain a certification from the appropriate state that any such discharge will comply with specified provisions of the Act. Warren argues that the release of water from its dam does not constitute a "discharge" within the meaning of that provision. The Court can thus resolve this case simply by determining the proper meaning of the term "any discharge" in § 401.

Warren argues, however, that the term "any discharge" in § 401 must be understood by reference to the definition of "discharge of a pollutant" in § 502(12). In particular, Warren contends that a "discharge" under § 401 must involve an "addition" to the navigable waters, in accordance with that definition. Warren submits that its release of water from the reservoir above its dam into the riverbed below the dam is not an "addition" of anything, and thus cannot be a "discharge." Warren invokes this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004),

for the proposition that a movement of material within the same water body cannot constitute an "addition."[2] The decision of the Maine Supreme Judicial Court below also addressed the term "addition" in § 502(12).

Whether a release of water from a dam may constitute an "addition" is not properly at issue in this case, however. Section 401 applies to "*any* discharge into navigable waters." When used in this way without qualification, § 502(16) of the Act makes clear that the term "discharge" *includes* a discharge of a pollutant and a discharge of pollutants. Because § 401 by its terms is not limited to "discharges of a pollutant," the Court need not address the meaning of that phrase, or consider whether a movement of material within the same water body constitutes an "addition" within its scope.

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[2] In *Miccosukee*, the Court remanded a claim that pumps moving water between a canal and an adjacent wetland that was a remnant of the original South Florida Everglades required a permit under § 402 of the Act, and directed the lower courts to determine whether the canal and the wetland constituted "meaningfully distinct water bodies." 541 U.S. at 112. The Court observed: "As the Second Circuit put it in *Trout Unlimited*, '[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.'" *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001)). The Court's discussion of this point was *dictum*, since it was not an issue disputed by the parties. *See id.* at 104 (characterizing issue as "the application of agreed-upon law to disputed facts"); 110 (noting the Tribe did not dispute legal issue). Moreover, the Court's discussion addressed discharges subject to § 402 of the Act; the Court did not consider discharges under § 401 or discharges of dredged or fill material under § 404.

II. IF THIS COURT NONETHELESS CONSIDERS THE PROPER SCOPE OF THE ACT'S REGULATION OF DISCHARGES OF POLLUTANTS, IT SHOULD RECOGNIZE THAT DISCHARGES OF DREDGED MATERIAL MAY BE REGULATED EVEN IF THEY OCCUR IN THE SAME WATER FROM WHICH THE MATERIAL WAS TAKEN.

A. The 1972 Amendments Expressly Regulate Discharges of Dredged Material, Even Though Such Discharges Typically Involve the Movement and Redeposit of Pollutants Within United States Waters.

Section 301(a) of the Act, enacted in 1972, prohibits the "discharge of any pollutant." Section 502(6) expressly defines "pollutant" to include "dredged spoil," and § 404(a) authorizes the Secretary of the Army to issue permits for the "discharge of dredged or fill material." These provisions reflect Congress's concern about the impacts caused by the disposal of dredged material, and demonstrate Congress's intent to regulate discharges that involve the movement and redeposit of pollutants – *i.e.*, dredged materials – within a single water body.

The very nature of dredged spoil and dredged material – as confirmed by regulations adopted upon enactment of § 404 by EPA and the U.S. Army Corps of Engineers ("Corps") – is that they originate in United States waters. *See* 40 C.F.R. § 232.2 (EPA regulation defining "dredged material" as "material that is excavated or dredged from waters of the United States"); 33 C.F.R. § 323.2(c) (Corps regulation similarly defining "dredged material"). Thus, any discharge of dredged material inherently involves *moving* material that originated in United States waters – not

introducing material to those waters from an external source.

Dredging practices common when Congress enacted § 404 unmistakably involved the movement of dredged sediments from one location to another within the same water body. One common practice, the redeposit of dredged material into water near the channel where it was dredged, is depicted in historic photographs reproduced in Appendix A to this brief. Contemporary engineering texts also discuss open water disposal of dredged material by hydraulic dredges. *See, e.g.*, HUSTON, JOHN, P.E., HYDRAULIC DREDGING, THEORETICAL AND APPLIED (1970). Among the common practices discussed is the use of side-casting booms to discharge dredged material back into the water near the channel being dredged. *See id.* at 21 (photograph of a dredge using "[t]wo 24-inch discharges [that] extend 290 feet outward" to discharge directly into the water); *id.* at 23 (photograph of "one of the first hopper dredges to carry a side-casting boom which enables it to discharge spoil more than 160 feet from the side of the cut," into the water); and *id.* at 118, 120 (photograph and description of equipment used to direct the flow of spoil "when spoil is being dumped in water adjoining a cut"). Huston notes that "[s]ilt, mud, and other soft materials which are more-or-less valueless for reclamation uses, are disposed of *wherever possible*." *Id.* at 117 (emphasis added).

Congress's awareness of the ecological impacts of dredging-related disposal practices, and of the fact that dredging typically involved a redeposit of dredged material into the waters from which it was drawn, is demonstrated in a 1970 hearing concerning the Chesapeake Bay. A study included in the record of that hearing noted that, with the need to deepen shipping channels in the Chesapeake Bay,

"[t]he disposal of spoil in the Bay becomes of increasing concern." Dep't of the Army, Chesapeake Bay Study and Hydraulic Model, *in The Chesapeake and Delaware Canal: Hearings Before the House Committee on Public Works*, 91st Cong. 49 (1970). The study states:

> The tons of muck removed from ship channels – the spoil – must be disposed of somewhere. All too often in the past, it has been dumped in the cheapest and most convenient location near the channel being dredged . . . The deposition of spoil from such dredging directly on top of oyster beds or so close that the silt smothers both the oysters and all other associated bottom life is also destructive.

Id.

Congress's concerns for the impacts of such dredging-related disposal practices on the aquatic ecosystem underlay the enactment of § 404. The Senate Conference Report on the 1972 amendments urged EPA and the Corps to "end the process of dumping dredged spoil into water – to limit to the greatest extent possible the disposal of dredged spoil in the navigable inland waters of the United States. . . ." S. Rep. No. 92-1236, *reprinted in* A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 177-178 (1972) (*hereinafter* LEGIS. HIST.). *See also id.* at 421-24 (statement of Rep. Vanik).

Moreover, in determining to regulate the discharge of dredged material, Congress fully recognized that dredged spoil is typically deposited in the same water from which it is drawn. According to the sponsor of the floor amendment that first proposed assigning the Corps permitting authority over the discharge of dredged material, such discharge involves "moving spoil material from one place in the

waterway to another, without the interjection of new pollutants." 1972 LEGIS. HIST. 1387 (statement of Sen. Ellender). *Accord*, *id.* at 1386 ("The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another.").

B. The 1977 Amendments Confirm That the Act Was Intended to Regulate Movement of Pollutants Within United States Waters.

The 1977 Amendments further confirm that Congress intended for the Act to regulate discharges of dredged material, notwithstanding that such discharges involve movement of pollutants within United States waters rather than introduction of pollutants to such waters from an outside source. The 1977 amendments enacted conditional exemptions for specified kinds of dredged material discharges, § 404(f)(1), but provided that those same discharges are subject to point source requirements for toxics, § 404(f)(1) (citing CWA § 307), and must obtain a point source permit where impacts on United States waters would be significant. Sec. 404(f)(2).

Tellingly, among the discharges that are subject to point source requirements in these circumstances are several that plainly involve relocation of dredged material within the same water body. These include, for example, discharges associated with "plowing" and "the maintenance of drainage ditches" in waters of the United States. Sec. 404(f)(1)(A) and (C).

Moreover, Congress worded § 404(f)(1)(C) narrowly to encompass only the "maintenance," but not the *construction*, of drainage ditches in wetlands. Thus, Congress

confirmed that ditch construction in United States waters – which typically involves relocation of dredged material over short distances – lacks even a *conditional* exemption from permitting.[3] Finally, the 1977 Amendments added an exemption for agricultural drainage, but limited it to "*minor* drainage." Sec. 404(f)(1)(A) (emphasis added). The drafters explained that "[t]he exemption for minor drainage does not apply to the drainage of swampland or other wetlands." S. REP. 95-370 76 (1977), *reprinted in* 1977 LEGIS. HIST. 709.[4] Congress' intent to regulate discharges associated with agricultural drainage activities – which likewise typically involve relocation of dredged material over short distances – further demonstrates that the relocation of pollutants within United States waters can involve a regulable discharge.

C. Every Appellate Court to Consider the Issue Has Held That a Discharge Occurs When Dredged Material is Relocated From One Place in United States Waters to Another.

The courts of appeals have consistently held, in a line of cases stretching back two decades, that a discharge occurs when dredged material is relocated from one place

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[3] *Accord*, 1977 LEGIS. HIST. 906 (colloquy of Sens. Muskie and Bentsen confirming that conditional exemptions do not include construction of drainage ditches).

[4] *Accord*, 1977 LEGIS. HIST. 1042 (statement of Senator Muskie noting that permits are required where ditches or channels are dredged in a swamp or other aquatic area; *id.* (Senator Dole) (noting that construction of canals or waterways designed to modify significantly or drain a swamp or marshland does not fall within the exemption for "minor drainage").

in United States waters to another, including redeposits *within* a single water body. The seminal case is *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983), which considered whether the redeposit of soil and other materials excavated in a wetland during land clearing activities constituted a discharge of fill material under § 404. The court observed:

> No one has urged here that the materials must come from an external source in order to constitute a discharge necessitating a § 404 permit, nor would we expect them to, since § 404 refers to "dredged" or "fill" material. . . . "[D]redged" material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute.

Id. at 924 n.43.

Relying on this principle, *Avoyelles* and other appellate decisions have found that relocating dredged or fill material within a single water body indeed constitutes a "discharge of a pollutant." *See, e.g., Avoyelles*, 715 F.2d at 920-26 (relocation of soil and other material within wetland constituted a discharge); *United States v. M.C.C. of Florida*, 772 F.2d 1501, 1505-06 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *analysis reaffirmed in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988) (tugboat propellers added dredged material by stirring up sediment that then settled on adjacent seagrass beds); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (relocation of dredged material from a ditch to the edge of the ditch constituted an "addition"); *United States v. Huebner*, 752 F.2d 1235, 1241-43 (7th Cir. 1985) (§ 404

permit required for use of earthmoving equipment to spread soil around wetlands); *United States v. Brace*, 41 F.3d 117, 127-29 (3d Cir. 1994) (same); *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815-16 (9th Cir. 2001), *aff'd*, 537 U.S. 999 (2002) (same). *Cf. Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (resuspension of sediments taken from streambed after removal of minerals during mining operation constituted a discharge).

This interpretation was recently confirmed by the Seventh Circuit in *Greenfield Mills v. Macklin*, 361 F.3d 934 (7th Cir. 2004). There the court found an addition occurred when the defendants opened a dam and the resulting flow scoured the river bottom and deposited sediment downstream. *Id.* at 947-49. According to the court, "it is logical to believe that soil and vegetation removed from one part of a wetland or waterway and deposited in another could disturb the ecological balance of the affected areas – both the area from which the material was removed and the area on which the material was deposited." *Id.* at 949.

Even the most restrictive appellate decision on the issue agrees that relocation of dredged material within United States waters – indeed, within a single water body – can constitute an addition. In *National Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the D.C. Circuit held that "incidental fallback," which occurs when dredged material is returned "virtually *to the spot* from which it came," *id.* at 1403 (emphasis added), does not constitute an "addition." *Id.* at 1405. However, the court acknowledged that relocation of dredged material to a *different* spot – even within the *same* water body – can constitute an "addition" and thus a

discharge. *Id.; accord id.* at 1402 (stating that the court was not questioning § 404 jurisdiction over "sidecasting," a practice that "involves placing removed soil . . . by the side of an excavated ditch"); 1407 (stating that the court did not question the regulation of "redeposits at some distance from the point of removal."). Likewise, *National Mining* expressly confirmed that *plowing* – which also involves relocation of dredged material a minimal distance from where it originated – can constitute an "addition." *Id.* at 1405.

These judicial decisions addressing dredged and fill material confirm that movement of pollutants within United States waters – indeed, within a single water body – can constitute an addition of a pollutant under the Act.

III. A DECISION UNDERMINING THE ACT'S AUTHORITY TO REGULATE DISCHARGES OF DREDGED SPOIL WITHIN WATERS OF THE UNITED STATES WOULD HAVE GRAVE IMPACTS ON WATER QUALITY, FRUSTRATING THE ACT'S PURPOSES.

Discharges of dredged material significantly degrade water quality, and do so regardless whether the dredged material originates in the same water body where it is discharged or comes from an entirely separate water body. Congress aimed to address two interrelated ecological effects of discharging dredged spoil into U.S. waters under § 404: "First, the destruction and degradation of aquatic resources that results from replacing water with dredged material or fill material; and second, the contamination of water resources with dredged or fill material that contains toxic substances." 1977 LEGIS. HIST. 910 (statement of Sen. Stafford). Congress recognized that "[t]o limit the jurisdiction

of the [Act] with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives." *Id.* at 911. *See also id.* at 417, 881-82, 888, 906-08, 916-19, 921-23, and 929 (remarks of Rep. Dingell and Sens. Stafford, Hart, Chafee, Baker, and Muskie).

Congress's concern is well warranted. Discharges of dredged material can have several serious impacts on water quality. As EPA has recognized,

> [E]xcavation and channelization activities typically result[] in suspension and distribution of material into the water column where it raises turbidity levels and may release contaminants into the water column. The result is that toxics, metals and other pollutants that were buried in sediment, held by anaerobic soils, or taken up by submerged aquatic vegetation, can be released and distributed in the water column and become available to fish and other aquatic life and degrade water quality. In addition, the dredged material suspended in the water column can be carried far downstream from the excavation point by river, stream, ditch, or wetland current before it settles out.

Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 65 Fed. Reg. 50,108, 50,112 (Aug. 16, 2000). *See id.* at 50,112-13 (describing how wetland soils trap and immobilize toxic and nontoxic pollutants, and how excavation activities and redeposit of dredged material leads to the release and resuspension of pollutants in the water column, with serious effects on the aquatic ecosystem). *Accord, e.g.*, 66 Fed. Reg. 4550, 4563-65 (Jan. 17, 2001) (preamble to final rule) (discussing scientific evidence regarding effects of

disturbance of sediments and redeposit of dredged material on water quality); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, WETLANDS: THEIR USE AND REGULATION 48-50, 124 (1984) (describing vital role that wetlands play in trapping toxic and nontoxic pollutants, and how excavation and redeposit of dredged material can release such pollutants).

As EPA has recognized, "the impacts resulting from redeposit of dredged material are not limited to contaminated material alone." Further Revisions, *supra*, 65 Fed. Reg. at 50,113. The suspension of sediments in the water column causes increased turbidity, which "can also harm aquatic life, smothering fish nurseries, mussels and benthic life and killing submerged aquatic vegetation." *Id.* The Fourth Circuit noted in *Deaton, supra*: "Even in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming aquatic life." 209 F.3d at 336. Moreover, the deposit of dredged or fill material can destroy functioning wetlands, eliminating their capacity to filter pollutants. *Id.*

Because these ecological impacts occur even when material is moved a short distance within the water body, it would make no sense to exclude such discharges from the purview of the Act. As the Fourth Circuit observed in *Deaton*:

> These effects are no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects on hydrology and the environment are the same. Surely Congress would not have used the word "addition" (in "addition of any pollutant") to prohibit the discharge of dredged spoil in a wetland,

> while intending to prohibit such pollution only when the dredged material comes from outside the wetland.

Id.

Indeed, as the Fifth Circuit noted in *Avoyelles*, reading the term "discharge" as requiring an "addition" of material from outside U.S. waters would virtually nullify the prohibition against unpermitted discharge of dredged material in §§ 301 and 404 altogether. Since dredged spoil by its very definition originates from U.S. waters, no discharge of dredged spoil would be covered under this reading, a result that clearly would be absurd in light of the Act's plain language in §§ 301 and 404. However, even a narrower holding that an "addition" does not occur when pollutants are moved within a single water body would have a crippling effect on the § 404 program, since most discharges of dredged material involve merely "moving spoil material from one place in the waterway to another." 1972 LEGIS. HIST. 1387 (statement of Sen. Ellender).

CONCLUSION

Because this case solely involves § 401, *amici* do not believe that this Court need even address the definition of "discharge of a pollutant" or the meaning of the term "addition" in § 502(12). If the Court does consider these issues, however, *amici* urge the Court to recognize that movement and redeposit of dredged or fill material within a single water body can constitute a "discharge of a pollutant."

Respectfully submitted,

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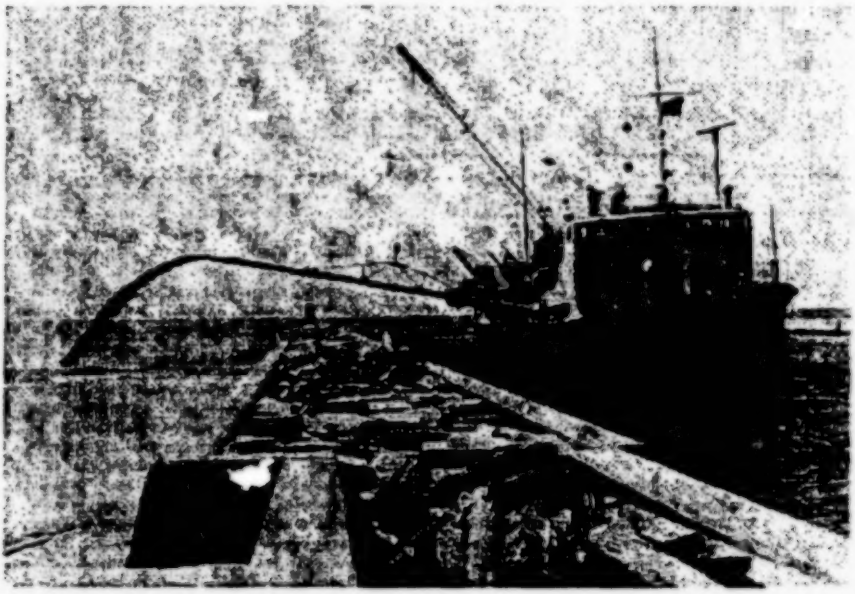
U.S. Army Corps of Engineers, Dredging operations Technical Support Program, Historic Dredging Photos, *at* http://el.erdc.usace.army.mil/dots/photos/page8.html.



The caption to this 1962 photo reads "Hains Casting-Over-the-Side, White Lake, Michigan."

Dredge discharging spoil directly into the water near the dredged channel.

HUSTON, JOHN, P.E., HYDRAULIC DREDGING, THEORETICAL AND APPLIED 23, 120 (1970).

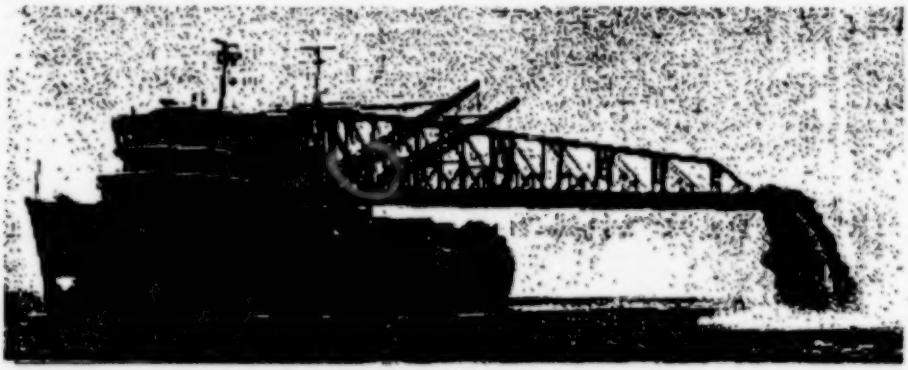


Fig. 24. Modern Hopper Dredge.
Boom is 160 feet long. (Corps of Engineers)

Dredge with a side-casting boom enabling it to discharge spoil near the channel being dredged.

Fig. 103. Baffle Plate Effect. (ARMCO Steel Corp.)

Dredge discharging spoil into the water near the dredged channel.

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